

**DISTRICT ATTORNEY****KINGS COUNTY**

350 JAY STREET
BROOKLYN, NY 11201-2908
(718) 250-2000
WWW.BROOKLYNDA.ORG

Eric Gonzalez

District Attorney

Radiyah Dobre

Assistant District Attorney

February 20, 2020



In connection with the above-named case, the People voluntarily provide the following information regarding:

MOS NAME: MARVIN LUIS

MOS TAX: 950787

in satisfaction (to the extent applicable) of their constitutional, statutory, and ethical obligations. Further, the People reserve the right to move in limine to preclude reference to this information, or otherwise to object to its use and/or introduction into evidence.

Disclosure # 1:

BY PUBLISHED DECISION AND ORDER IN PEOPLE V. FERNANDO DURAN, 51 MISC. 3D 1220(A), 2016 NY SLIP. OP. 50723(U) (SUP. CT., KINGS CTY.), DATED 05/09/2016, JUSTICE RUTH SHILLINGFORD GRANTED DEFENDANT'S MOTION TO SUPPRESS EVIDENCE FOLLOWING A COMBINED INGLE/DUNAWAY/MAPP/HUNTLEY HEARING. MOS LUIS, SHIELD NUMBER 16926, TESTIFIED FOR THE PEOPLE REGARDING THE STOP OF A CAR IN WHICH DEFENDANT WAS RIDING. MOS LUIS TESTIFIED THAT, AS HE APPROACHED THE CAR, HE OBSERVED DEFENDANT IN THE PASSENGER SEAT, HOLDING IN HIS HAND A GLASSINE ENVELOPE CONTAINING HEROIN. USING A FOLDED BIT OF PAPER, MOS LUIS DEMONSTRATED IN COURT HOW HE HAD BEEN ABLE TO SEE THAT THE GLASSINE WAS STAMPED WITH A LABEL OR BRAND; HE COULD NOT RECALL WHAT THE LABEL OR STAMP WAS. JUSTICE SHILLINGFORD FOUND MOS LUIS'S TESTIMONY UNWORTHY OF BELIEF AND INCREDIBLE. THE COURT CITED WHAT IT CONSIDERED TO BE A NUMBER OF INCONSISTENCIES BETWEEN MOS LUIS'S TESTIMONY AND OTHER EVIDENCE IN THE CASE (INCLUDING CREDIBLE HEARING TESTIMONY FROM THE OTHER MOS AT THE SCENE) AND NOTED THAT MOS LUIS HAD RESPONDED ONLY THAT HE COULD NOT "EXACTLY RECALL" WHEN CONFRONTED AT THE HEARING WITH HIS OWN PRIOR INCONSISTENT STATEMENTS. THE COURT SPECIFICALLY DETAILED ITS CONCLUSION THAT IT WOULD HAVE BEEN IMPOSSIBLE FOR MOS LUIS TO HAVE SEEN THE LABEL AND THE STAMP ON A GLASSINE OF HEROIN UNDER THE CIRCUMSTANCES AND IN THE MANNER WHICH HE HAD RECOUNTED AT THE HEARING. THE COURT SUPPRESSED THE HEROIN RECOVERED FROM DEFENDANT AS THE PRODUCT OF AN UNLAWFUL SEARCH, AND SUPPRESSED ADDITIONAL EVIDENCE (A FIREARM AND INculpatory STATEMENT) AS FRUIT OF THE POISONOUS TREE.

THE CASE WAS DISMISSED ON 06/17/2016. A COPY OF THE JUDGE'S DECISION IS ATTACHED HERETO BELOW.

Disclosure # 2:

THE NYPD SUBSTANTIATED THE FOLLOWING ALLEGATION AGAINST MOS LUIS ARISING OUT OF AN INCIDENT ON 06/03/2014:

ALLEGATION:

1. TRAFFIC VIOLATIONS BUREAU – COURT - NON-APPEARANCE
- CASE STATUS: CLOSED ON 10/01/2015

PENALTY: LETTER OF INSTRUCTION

Disclosure # 3: (PENDING)

THE FOLLOWING ALLEGATIONS ARE PENDING AGAINST MOS LUIS ARISING OUT OF AN INCIDENT ON
12/31/2018:

ALLEGATIONS:

1. DISPUTED STOP OF A VEHICLE - ENFORCEMENT ACTION TAKEN - ARREST/SUMMONS
2. DISPUTED ARREST

CASE STATUS: PENDING

SEE ATTACHMENTS BELOW.

Eric Gonzalez
District Attorney
Kings County

People v Duran

Supreme Court of New York, Kings County

May 9, 2016, Decided

828/2015

Reporter

2016 N.Y. Misc. LEXIS 1713 *; 2016 NY Slip Op 50723(U) **, 51 Misc. 3d 1220(A); 41 N.Y.S.3d 451

[**1] The People of the State of New York against
Fernando Duran, Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL
NOT BE PUBLISHED IN THE PRINTED OFFICIAL
REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK
SUPPLEMENT.

Counsel: [*1] For Defendant: Gary A. Farrell, Esquire,
Krystyn Tendy, Esquire, District Attorney Kenneth P.
Thompson.

Judges: Ruth E. Shillingford, A.J.S.C.

Opinion by: Ruth E. Shillingford

Opinion

Ruth E. Shillingford, J.

Defendant is charged with, *inter alia*, Criminal Possession of a Weapon in the Second Degree (PL §265.03 [3]). This Court conducted a combined *Ingle/Dunaway/Mapp/Huntley* hearing, followed by the parties' written submission. For the reasons that follow, defendant's motion to suppress is granted.

FINDINGS OF FACT¹

¹ Numbers preceded by "H" and "H1" refer to the minutes of the hearing on March 1 and March 2, 2016, respectively.

To the extent that the People seek to have the court consider evidence which was not part of the hearing record, this Court declines its invitation to do so (see People v. Torrance, 298 AD2d 857, 747 N.Y.S.2d 823 [4th Dept.], lv denied 99 NY2d 540, 782 N.E.2d 579, 752 N.Y.S.2d 601 [2002]; People v. Maxis, 50 AD3d 922, 923, 855 N.Y.S.2d 251 [2nd Dept.

I. The People's Case

A. Officer Portillo

Police Officer Ramon Portillo, assigned to the Anti-Crime Unit, which handles violent felonies such as burglaries and robberies, had been involved in approximately 300 arrests, 25 to 30 of which involved firearms and about 90 for narcotics possession. A top priority for the officers of this unit is to get "illegal guns off the street" (H: 29-30). On January 30, 2015, Officer Portillo was working a [*2] 3:00 p.m. to 11:25 p.m. tour with his partner Officer Marvin Luis in plainclothes; he drove the unmarked car while Officer Luis was the front seat passenger. At approximately 9:50 p.m., Officer Portillo was stopped westbound on Hancock Street facing Knickerbocker Avenue, which is a one-way street with a parking lane on each side. Defense Exhibits E, F, H through M depict all the blocks from Hancock to Menahan except Putnam Street. He saw "a tan [Lincoln] SUV that crossed the path at a high rate of speed." He was not able to discern the number or ethnicity of the occupants in the car, in part because the windows were somewhat tinted. He then made a right turn and followed the vehicle but could not recall whether he was directly behind it (H: 12-13; 30; 34; 68; H1: 106-107). On cross-examination, he acknowledged that it was a gray, four-door 2006 Navigator depicted in Defense Exhibits A1 & 2, B1 & 2 and C1²

(hereinafter "the SUV").

2008J.

² A1 depicts the passenger side of the SUV; A2 looks like the back of the vehicle that he pulled over but "[i]t could be another vehicle that's the same, you know, make and model"

(H: 39-40). B1 and B2 depict the passenger side window of the SUV (H: 40-41). C1 depicts the VIN number of the [*3] vehicle, while C2 look similar to the vehicle in question, except that there was no snow on the day in question (H: 41-42)

According to Officer Portillo, "[t]here w[ere] double-parked vehicles on Knickerbocker Avenue travelling northwest. That's the flow of Knickerbocker, which is a one-way street. I observed a couple of cars that were double-parked. There were cars that were turning left out of the intersection onto other main streets. And what caught my attention was the velocity of this vehicle. When cars were right in front of that vehicle, when they turned left or right, what have you, this vehicle was not stopping. Because, from our observation, no taillights were applied, you know. Once you step on the brakes, taillights would be applied, so they would light up. This vehicle wasn't stopping. It was just going around these vehicles without slowing down" (H: 13-14). He never observed any cars brake to avoid striking the SUV. According to the officer, "[w]hat I did observe was vehicles trying to make a right turn or left turn off Knickerbocker Avenue. So I didn't have a chance. So the Lincoln was directly behind these vehicles. So when he was passing these vehicles, when he [*4] failed to signal, did not stop, because I didn't see any brake light lights up, and he went around these vehicle at excessive speed, never slowing down" (H: 49-50).

There are ten blocks between Hancock Street and Menahan Street (Defense Exhibit D). Although the speed limit on Knickerbocker Avenue was 25 miles per hour, he observed that as he followed the SUV within five or six blocks as he went "from Gates to Woodbine" Streets but [**2] before Grove Street, his own speedometer read between 35 to 45 miles per hour (H: 44; 47-48). The SUV passed a double parked car without signaling between Jefferson Avenue and Cornelia Street, although there is nothing illegal about passing a double-parked car (H: 61-63; Defense Exhibit E). Officer Portillo also saw the SUV pass to the right of a vehicle which was about to make a left turn on Woodbine Street and then continue on Knickerbocker (H: 64-67; Defense Exhibit I). According to Officer Portillo, under this scenario, the driver "needs to slow down and give the vehicle behind him notice that there's a car in front of him that is turning left. So he needs to slow down and signal away from that vehicle and then signal back into the lane. He was pulling [*5] over, but he didn't pull over. He just went over to the right and went back into the intersection" (H: 67).

From his initial observation of the SUV at Hancock Street, Officer Portillo followed it for about eight or nine blocks until finally initiating his sirens and lights at the corner of Grove Street and Knickerbocker Avenue, at which point he was directly behind the SUV; it pulled over within a block on Knickerbocker Avenue and

Menahan Street, closer to Menahan (H: 69-71; Defense Exhibit M with "X" mark). He approached the driver, Rudy Espinal ("Mr. Espinal") and standing by the rear driver's side about five feet from the rear of the SUV, he observed that his window was "slightly open." Even as he approached the SUV with his flashlight, Officer Portillo could not ascertain the number of occupants because the windows "were somewhat tinted" (H: 73). Both he and Officer Luis did not have their guns drawn and their shields were outside their clothing. Officer Luis approached the passenger's side but Officer Portillo could not see what he was doing. Officer Portillo then asked and Mr. Espinal complied with his directive to "lower all the windows" (H1: 16-19). On cross-examination, he [*6] explained that when Mr. Espinal initially lowered his windows "a little bit," he "just could see [Mr. Espinal], I mean, he lowered the windows slightly, so I kind of saw his face, but then he was having trouble with the buttons, whatever. It's not his car so he actually ended up lowering all the windows for me. So I did see a clear — I could see into the vehicle after he lowered them" (H: 75-76). He did not learn until much later that the vehicle did not belong to Mr. Espinal. He was able to see defendant at that point as he stood "between the front driver door, like jam, and in between the rear passenger, directly where the motorist would sit, passenger" and could see that the driver's window was partially open (H: 77; 90).

Officer Portillo requested Mr. Espinal's license, registration and insurance. Within ten seconds, he retrieved the registration and insurance from the middle console. After providing these documents, Mr. Espinal told him that his license was suspended due to his failure to pay child support and that the SUV belonged to his cousin. At Officer Portillo's order, Mr. Espinal stepped out of the car (H: 17-18; 77; 80-81).

While he could not see what Officer Luis was doing, [*7] Officer Portillo heard him call his name and state, "[c]ome help me" or "help, Ray, help" (H: 19; 79). Although he did not "hear exactly what was said," he did hear defendant yelling at Officer Luis words to the effect, "hey, what are you doing, why are you searching, I didn't do anything" (H: 81). He left Mr. Espinal and proceeded to the passenger side where he found defendant front-cuffed in his seat while Officer Luis stood next to the SUV. He then helped Officer Luis remove defendant from the vehicle. He recalled that "it was very violent because the individual refused to get out of the vehicle and abide by the order of just moving along to the side and getting out of the vehicle. So [*3] he jerked away and pushed away and held onto

his waistband." They were able to remove defendant from the SUV and place him with his back against the SUV, whereupon, Officer Portillo radioed for assistance. Meanwhile, Officer Luis went into the vehicle (H: 22).

Defendant "was pinning himself against the car and basically doing the motion of bending down to hide something from us. So that's when we had to straighten him up against the car" (H: 92). With the assistance of three back-up officers (he could not [*8] recall their names), they were able to remove the handcuffs and rear-cuff defendant. Officer Portillo then "[frisked him around his waistband, around his legs, around anything to see if, you know, any contraband or weapons or, you know, if he possessed any]" (H: 22-23). He then "felt a hard object that felt like a handle of — when I lifted up his shirt, it was L-shaped. It was — it was a pistol with a holster clipped onto the front of his waist" (H: 23). The gun was in the holster and positioned under defendant's belly button to the right side. He did not immediately remove the gun although he had frisked defendant for his safety. Instead, he let Officer Luis retrieve it. He explained that defendant "didn't have access to the gun, so it didn't immediately have to be removed. We want to make sure that Rudy's not running around if you have to safeguard everybody. So knowing that he's rear-cuffed, I felt comfortable enough that Luis could walk by, recover the gun and, you know, proceed to talk to Rudy" (H: 91-92). He continued frisking defendant but did not recall either feeling or recovering a pack of cigarettes from him H: 24; 83-85).

They then walked defendant back to the 83rd Precinct, which [*9] was a block away. " [F]rom the time [Officer Portillo was] on scene to the time [he] went to processing," defendant said "that was his favorite gun" (H: 24). Specifically, he recalled that when the desk supervisor at the 83rd Precinct took control of the gun for processing, defendant said something to the effect, "that's my favorite gun" or "I love that gun," although Officer Portillo made no notations in his memobook (H: 87-88).³ He could not recall if he mentioned the statement to the prosecutor when he went with Officer Luis to speak to him regarding the grand jury presentation (H: 88-89).

Notwithstanding his observations of Mr. Espinal speeding, Officer Portillo never called for any assistance during the chase. Mr. Espinal was not charged with

speeding, although he was charged with "Reckless Operation," unlicensed operation and driving with a suspended license. Officer Doria was not at Knickerbocker Avenue during this incident but his role was to "enhance[e] gun cases" (H: 29).

B. Officer Luis

Officer Luis has been an officer for four and a half years, four of which had been spent at the 83rd Precinct. On January [*10] 30, 2015, he was part of the Anti-Crime Unit working a 3:00 p.m. to 11:30 p.m. tour, on patrol looking for crimes in progress with his partner Officer Portillo; they both were in plain clothes. His shield was displayed around his neck on top of his clothing.

Nothing requiring police action occurred until shortly before 9:50 p.m. They were stopped at the intersection of Hancock Street facing Knickerbocker Avenue in an unmarked Impala when he saw a Lincoln Navigator "travelling at a high rate of speed down Knickerbocker [*4] Avenue" (H1: 106). Knickerbocker Avenue is a one-way street and on that night there were cars parked on both sides (H1: 142). He could not see either the number or the ethnicity of persons in the vehicle due to the tint on the windows. The vehicle depicted in Defense Exhibits A1 & 2 and B1 & 2 is similar to the SUV in question. Officer Portillo made a right turn onto Knickerbocker and "[got] behind the Lincoln Navigator" (H1: 106-07). On cross-examination, Officer Luis claimed that he did "not exactly" remember telling the grand jury that after observing the SUV, he had made a right turn. The People stipulated that this was his testimony (H1: 134-36).⁴ He also stated on cross [*11] examination that he knew they "were not exactly behind him when [they] first turned onto Knickerbocker" (H1: 153).

The SUV was "travelling at a high rate of speed, kind of swerving or (sic) Knickerbocker Avenue" and Officer Portillo "had to speed up in order to catch up to the Lincoln Navigator truck" (H1: 107). Although he did not actually look at the odometer, he "observed the Lincoln Navigator overtake a car on Woodbine Street and Knickerbocker Avenue there was actually a vehicle in front of the Lincoln that was preparing to make a left turn on to Woodbine Street. I observed the Lincoln Navigator actually go around it rather quickly and continue on Knickerbocker Avenue" (H: 12-14; 50; H1:

³The People concede that they did not give timely notice pursuant to [CPL § 710.30\(1\)\(a\)](#) of these statements.

⁴The People subsequently stipulated in that regard on each occasion Officer Luis lacked recollection of his prior testimony.

108). He did not see the SUV use any brake lights at that time or at any time as they followed it. On cross-examination, unlike Officer Portillo, he claimed that Mr. Espinal passed on the left side of the vehicle that was about to make a left turn and cut off that vehicle, which then "had to slam on the brakes to avoid hitting the Navigator" since the SUV "swerved in front of [*12] that vehicle so quickly" (H1: 143-44). The SUV did not go around parked cars, only moving cars (H1: 144).

On cross-examination, Officer Luis acknowledged that he had attested to the factual allegations of Mr. Espinal's Criminal Court complaint that he "observed defendant drive around the vehicle ahead of defendant's vehicle after with [he] observed defendant move directly in front of said vehicle. And further, that [he] observed the driver of one of the vehicles apply the brakes of said vehicle to avoid colliding with defendant's vehicle" (H1: 137-38; 140-42). He did not recall the SUV swerving to the right on the corner of Jefferson and Knickerbocker Avenues. There are approximately four traffic lights in that ten-block radius from Hancock through Menahan and Mr. Espinal never utilized his brakes to stop and he "made every green light" (H1: 145-47).

"A little bit after Gates Avenue," Officer Portillo turned on the lights and sirens and the SUV pulled to the right; they pulled up behind it. The "X" depicted on Defense Exhibit M does not accurately reflect where they stopped the vehicle; it was closer to Grove Street not Menahan Street (H1: 148-49). He acknowledged that he was not accurate [*13] when he indicated on his online booking arrest worksheet that the stop was on "Menahan Street and Knickerbocker northeast corner of" (H1: 150-51). He claimed that he did not recall testifying before the Grand Jury that he "proceeded to pull the vehicle over" instead of Officer Portillo (H: 151-52).

Officer Luis approached the passenger side with his flashlight on and out, but his gun was not drawn. As he walked from the back of the SUV towards the front, "I was pointing my flashlight I observed there was nobody in the back seat, my flashlight was going through the [*5] tinted windows. I observed there was no one in the back seat. As I got to the passenger seat I realized that there was a driver in the car and a passenger, then I focused my flashlight on the passenger" (H1: 157). When he approached the front passenger window, it "was a little less than halfway open" (H1: 110). On cross examination, he claimed that he "could actually see" Officer Portillo "through the car because both windows were open," although the two back windows were

closed and tinted (H1: 154-55). From about six inches away, he "pointed [his] flashlight through the window and a little bit above the window where it was [*14] opened to look inside to see inside where the passenger was sitting." He saw defendant in the passenger seat and he was "holding what appeared to be a glassine of heroine (sic) in his left hand" (H1: 112-14; 155-56).

Utilizing a small folded "post-it," Officer Luis asserted that when defendant held the glassine, defendant's left hand was closed with the paper partially exposed with "three fingers down. The thumb on top of the index finger which is folded over" (H1: 121). The palm of defendant's hand was facing him (H1: 121-22). Defendant's hand "was halfway open. I was able to see the top of the glassine that was sticking out, the part of his hand that was not completely closed" (H1: 157). In demonstrating again, he indicated that defendant's "fist was opened as far as maybe three fingers were approximately closed and these fingers," namely, the thumb and forefinger, were "a little loose. They were not closed. I could observe what was inside in between" (H1: 157-58). It looked as if it were one glassine with a label on it and although he could see that it was stamped, he could not recall either the label or the stamp (H1:159; 161). The print on the label was "a little bit smaller" than [*15] the "Hancock St" on Defense Exhibit D and when compared to the print that is typewritten on a letter, "it was a little bolder and also, it was in color and, the rest of the glassine was white and so, the actual markings on it were a little bit bolder and in color" (H1: 159-60).

He did not recall telling the Grand Jury "[a]s I approached the passenger side I did observe the passenger with a deck of heroine (sic) in a hand. I noticed it by the packaging. It also had a label on it" (H1: 159). Nor did he tell ADA Midey that defendant attempted to conceal several glassines behind his back (H1: 165).

The front passenger window then "went completely down" and he put his "hand on the actual, where the glass would go up and [his] flashlight was now actually inside of the car" (H1: 114). According to Officer Luis, "I was just looking around to see if there is anything around the passenger's feet, anywhere around him and I observed my partner talking to the driver and actually pulling him out of the vehicle. Not physically pulling him out, but asking him to step out of the vehicle" (*id.*).

He then asked defendant to step out of the car but he refused and stated that he did not consent to any

searches. [*16] He asked him again and told defendant that he was under arrest; but defendant said nothing, instead he kept his body "very stiff" and "was not really moving at all" (H1: 115; 173). On cross examination, Officer Luis did not "exactly recall" that he gave the following answers to the Grand Jury:

QUESTION: Now, what did you do after you made that observation of him holding those or explain a deck to us, please.

ANSWER: Okay, it is pretty much a clear plastic bag and it has substance in it. Powdery substance in it.

QUESTION: And what did you do after you made those observations?

ANSWER: I told the passenger that quote, You are under arrest, step outside of the vehicle (H1: 162-63).

He then testified that he was "[n]ot exactly sure" if the first words he told defendant was "you are under arrest. Get out of the vehicle," although he did say that to defendant (H1: 163). Nor were the words seeking help from Officer Portillo the first ones he uttered before telling defendant he was under arrest. Officer Luis denied that he told ADA Midey that it was Officer Doria who approached the driver's side of the SUV (H1: 163-65).

According to Officer Luis, "I grabbed the defendant's arm. So I actually opened the [*17] door and grabbed the defendant's arm to physically remove him from the vehicle. At which point he started struggling with me, by pulling his arm back to try to stay inside of the car. I was able to get my cuffs on him in the front of him instead of being rear cuffed in the front of him while he was actually inside of the car I grabbed one of his hands and began to pull him out of the car. I already had my cuffs in one of my hands, so I put the cuff on the hand that I had and then I was able to grab the second hand while he was in the car and put the second cuff on him" (H1: 115-16).

He almost had defendant out of the SUV but then called his partner for help. They "got him outside of the vehicle because he was flailing his body and stuff. He was on the ground and we picked him up from the ground" (H1: 117). Officer Luis then "did a quick frisk of his outer garments. I wasn't able to really frisk by the front waistband because his arms were front-cuffed at the time and they were pretty tight there. Like he was not moving his hands from that location" (*id.*). He maintained, nonetheless, that defendant had been front-cuffed inside the SUV, that "then he came outside of the

car which he was [*18] on the ground with handcuffs flailing as we got him up his body was up against the car, he was actually cuffed, but not rear cuffed;" that his chest was leaning against the side of the SUV; and then he and Officer Portillo rear-cuffed him (H1: 168-69).

Officer Luis could not recall giving the following testimony to the Grand Jury:

QUESTION: Were you eventually able to get the defendant out of the car?

ANSWER: Yes.

QUESTION: And can you explain to us that?

ANSWER: As we were pulling him out he was resisting to get out of the car and once he did get out of the car he placed his body firmly on the car so that we could and his hands in front of him, so we could not grab his arms and his chest was leaning up against it with his hand, so that we could not grab his hands or we couldn't.

We were not able to put any handcuffs on him (H1: 166-68).

Officer Portillo took defendant to the back of the SUV and Officer Luis 'went into the passenger seat to see if [he] could recover what [he] saw in his left hand' (H1: 117; 169). There were four or five officers, whose names he could not recall, with Officer Portillo at that point. Officer Luis found a bundle of glassines on the floor "toward the left side [*19] of the vehicle, but it was in the passenger side on the passenger [floor], but like toward the left" (H1: 117; 169-70). He retrieved the ten glassines that were packaged together and then heard Officer Portillo call him.

When he went to the back of the SUV, he saw that Officer Portillo had raised defendant's shirt and that defendant had "a firearm which is tucked underneath his belt and it was held by a holster [He] recovered the firearm from that area and the defendant at that time was rear-cuffed" (H1: 117-18; 170). He then clarified that defendant was rear-cuffed when he saw him with his shirt raised (*id.*). He also recovered a cigarette box from defendant and Officer Portillo vouchered the items (H1: 171-72).

At about 11:10 p.m. that night, Officer Luis was at the precinct processing the arrest. He was in the Detective Squad with Detective Doria. People's Exhibit 1 is the *Miranda* warning form that Detective Doria read to defendant, which contains the handwritten word, "yes" after each of the six questions but with the initial "FD" only in the line for the first question. Neither officer had his gun drawn; and no threats or promises were made

to defendant. The latter then "stated that [*20] he was with his cousin. They went to pick up a stack of heroine (sic) at a location on Knickerbocker and at that time they were heading back home and his cousin had nothing to do with the gun that he had. He had it for protection" (H1: 127; 175-77). Defendant then refused to make a written statement (People's 1A; H1: 176-77). The interview ended at 11:25 p.m. (H1: 127-28).

Officer Luis did not make any notations regarding any erratic driving or speeding by Mr. Espinal (H1: 174) or of Mr. Espinal's statements (H1: 177).

On redirect, Officer Luis confirmed the crux of his testimony on direct (H1: 178-83).

The Defense

Defendant presented the testimony of Assistant District Attorney Matthew Midey (hereinafter, "ADA Midey"), whom the court finds credible, and Rudy Espinal ("Mr. Espinal"). ADA Midey presented the case to the grand jury and spoke with Officer Luis, who was the sole witness, prior to the latter's testimony. He prepared a Grand Jury Synopsis sheet (hereinafter, "Synopsis sheet") and recalled that Officer Luis told him that defendant "attempted to conceal glassines of heroine (sic) by putting them behind his back" (H1: 198-99; 204-05). Although he tried to be as accurate as possible [*21] when preparing the Synopsis sheet, he acknowledged that he mistakenly indicated on that sheet that it was Detective Doria who had approached the driver's side of the SUV (H1: 196-197). The Synopsis sheet is not shown to the witness, nor sworn. He would rely on the grand jury minutes as opposed to his Synopsis sheet in his "casework" (H1: 203). He did not remember whether he met with Detective Doria or Det. Portillo prior to presenting the case to the grand jury. While he did not recall the details of his conversation with Officer Luis, he remembered the "basic facts," to wit:

I remember the car stop and how it went down. When I interviewed Officer Luis I don't [*22] remember every nuance of the conversation we had, but I do remember the case because I had had conversations with Ms. Bersin about this case prior to Mr. Farrell. I believe there was a program potentially for the defendant which was declined. I remember the broad strokes of it, but not every nuance of what went into it (H1: 203-04).

According to Mr. Espinal, he is close to defendant, who

is his cousin, as well as their uncle, who owns the SUV and frequently lets him use it (Defense Exhibits 1A, 1B, 2A & 2B). On January 30, 2015, [*23] defendant and Mr. Espinal were "hanging out" at home with their friend, Julio, whose last name Mr. Espinal did not know because Julio was closer to defendant; Julio had taken the train to get to Mr. Espinal's house. He was not sure what time it was that they started hanging together; it was about 9 or 9:30 that evening, he was "not too sure what time it was" but he had been there for a few hours (H1: 226-27). Julio left his house at about 9 or 9:30; Mr. Espinal did not remember the exact time but knew "it was nighttime" (H1: 228).

At about 8:00 p.m., Mr. Espinal drove their uncle's Navigator to take Julio to his house on 91st Avenue in Queens. After dropping him off, they were returning home via "Cypress to Knickerbocker to Flushing" (H1: 208-10). He was familiar with Knickerbocker Avenue, a one-way street with one lane of traffic. Because he had failed to pay child support, his license had been suspended and thus, he did not have a valid license that night. He was driving at a normal speed, about twenty miles per hour, when he crossed various intersections including Jefferson, Gates, Putnam and Woodbine Avenues, some of which had traffic lights. He never "swerve[d] around a moving car on Knickerbocker [*23] from Hancock to Menahan" (H1: 216). Nor did he "swerve[e] around any double-parked cars at a high rate of speed or in a dangerous manner" (H1: 216).

When he reached around the intersection of Grove and Knickerbocker Avenues, upon seeing police lights in his rearview mirror, he immediately pulled over in the middle of the road to the right. He did not say anything to defendant, who was sitting in the front passenger seat, although Mr. Espinal was looking around. He thought that the police car was going past him but instead the officers parked behind him; at one officer's directive, he lowered his window but all the other windows remained closed. Specifically, the officer who approached his window asked for his registration. As Mr. Espinal was looking for it in the glove compartment, the Officer said, "don't worry guys, we are going to let you go, saying he was looking for guns, said that is what he is looking for" (H1: 218-19). He never saw any glassine in defendant's hand as he reached across him to the glove compartment. The officer pulled him out of the car and after searching him on the side of the Navigator towards the back, he concluded that Mr. Espinal was "clean" (H1: 219-20; 237-39).

[*24] Only Mr. Espinal's window was down when he

went to the back. Although he could not see defendant, he heard a commotion and recognized that there was "a little arguing back and forth" and recognized one of the voices to be that of defendant. The officer with him told him to "stay right there" and "went around the truck a little." According to Mr. Espinal, the officer then "just says stay right there again and he went around the truck and there was a bunch of commotion. I did not move because I could not move. He told to stay right there. I just hear a [**7] bunch of cops coming out of the precinct that was right across the street and that is all I saw was the little commotion, a bunch of policeman came out and by the time I looked to the left they had Fernando on the [ground]. From then on, that is it, they just rushed us into the precinct" (H1: 220-22). After they finished with defendant, they handcuffed Mr. Espinal and drove him to the precinct; defendant was not in the vehicle with Mr. Espinal (H1: 222-23).

Mr. Espinal has prior convictions for Attempted Criminal Sale of a Controlled Substance in the Third Degree (1996) and Possession of Marijuana (2002). In this case, he was charged later [**25] and eventually pleaded guilty to having a suspended license (H1: 223). Although he had suspected, because he had been warned previously, that his license had been suspended for failing to pay child support, he nonetheless took the chance when he drove Julio (H1: 229-30). Before taking the stand, he had spoken with defendant the night before and the latter advised him about some of the substance of Officer Portillo testimony the preceding day. Similarly, defense counsel told him about Officer Luis' testimony and they reviewed potential cross-examination questions. At the precinct, the officers only told him that he would be charged with not having a license, but when he was arraigned he learned that he had been charged with driving with a suspended license and falsely charged with reckless driving. Although he pleaded guilty to the suspended license charge, he never told the judge that the police had lied about the other charges (H1: 232-35). Neither he nor his attorney contacted the CCRB or the media regarding the officer's lies; while he did not contact IAB, he did not know whether his attorney had done so.

CONCLUSIONS OF LAW

Defendant claims that the testimony of the officers, and [**26] in particular that of Officer Luis, is unworthy of belief and thus requires suppression of the contraband recovered in the SUV, the weapon recovered from his person, and any subsequent statements. The People

counter that upon viewing the various traffic infractions, there was ample probable cause to stop the SUV and that upon observing defendant in possession of the glassines, probable cause to arrest him and for the subsequent search and recovery of the weapon. This Court agrees that the testimony of Officer Luis, as outlined above, is unworthy of belief and grants defendant's motion to suppress all contraband and statements in question.

"As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred" (*People v. Robinson*, 97 NY2d 341, 348-49, 767 N.E.2d 638, 741 N.Y.S.2d 147 [2001]; see also, *People v. Hamilton*, 89 AD3d 1104, 933 N.Y.S.2d 590 [2d Dept. 2011], lv denied 18 NY3d 994, 968 N.E.2d 1005, 945 N.Y.S.2d 649 [2012]; *People v. John*, 119 AD3d 709, 710, 988 N.Y.S.2d 885 [2d Dept.], lv denied 24 NY3d 1003, 997 N.Y.S.2d 121, 21 N.E.3d 573, 2014 NY Slip Op 98805[U] [2014]). It is also established that "provided a traffic stop is supported by probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant" (*People v. Wright*, 98 NY2d 657, 658-59, 773 N.E.2d 1011, 746 N.Y.S.2d 273 [2002] quoting *Robinson* 97 NY2d at 349; see also, *People v. Baksh*, 113 AD3d 626, 977 N.Y.S.2d 407 [2d Dept.], lv denied 23 NY3d 1034, 993 N.Y.S.2d 247, 17 N.E.3d 502, 2014 NY Slip Op 98076[U] [2014]).

In this case, the Court credits the testimony of Officer Portillo that Mr. Espinal, [**27] at the minimum, violated the vehicle and traffic laws by driving in excess of the speed limit. As such, there was probable cause for the stop (*People v. John*, *supra*).

"Pursuant to the automobile exception to the warrant requirement, a warrantless search of a vehicle is permitted when the police have probable cause to believe the vehicle contains [**8] contraband, a weapon, or evidence of a crime" (*People v. Baksh*, *supra*; *People v. Page*, 137 AD3d 817, 26 N.Y.S.3d 567 [2d Dept. 2016]). In assessing the credibility of the witnesses, the court "should not discard common sense and knowledge. The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience or self-contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced in the case" (*In the Matter of Carl W.*, 174 AD2d 678, 679-80, 571 N.Y.S.2d 536 [1st

Dept. 1991], quoting *People v. Garafolo*, 44 AD2d 86, 88, 353 N.Y.S.2d 500 [2d Dept. 1974])(citations omitted). Nor should the court "credit testimony which has all appearances of having been patently tailored to nullify constitutional objections" (*id.*; *People v. Quinones*, 61 AD2d 765, 402 N.Y.S.2d 196 [1st Dept. 1978]).

Here, Officer Luis testimony was fraught with inconsistencies regarding what he saw (glassine versus a deck of glassines with a label); what defendant did with the glassine (denying that he told ADA [*28] Midey that defendant had tried to hide some glassines behind his back); who was driving (Officer Portillo versus Officer Luis); whether he could see Officer Portillo (both approached the driver and passenger sides, respectively, and Officer Portillo could not see Officer Luis); that the window was halfway down when he simultaneously approached with Officer Portillo, who credibly testified that only the driver's side window was slightly open at that point; that contrary to *the driver*, Officer Portillo, a car had to brake in order to avoid being struck by the SUV. Indeed, his testimony was inconsistent about when defendant was handcuffed, even though he was the one who purportedly front-cuffed defendant. And even when confronted with his prior inconsistent statements could only muster a response that he could not "exactly recall."

Under these circumstances, this Court rejects, as incredible and unbelievable, Officer Luis' claim that he was able to see not just a glassine but both the label and stamp on it while defendant's hand was almost closed. His in-court demonstration made clear that it would have been impossible for him to have made his purported observation, even if the window [*29] was "a little less than halfway open" from six inches away in this tinted SUV that he acknowledged was "raised up" and "a high-sitting vehicle, compared to a typical car" (H1: 155). In light of the foregoing, there was no probable cause to believe that the SUV contained contraband to support its warrantless search after defendant was removed from the vehicle or for defendant's arrest. Accordingly defendant's motion to suppress the heroin is granted. Furthermore, suppression of the weapon and any "statement[s] made by the defendant to law enforcement officials [is] also required, as such evidence was fruit of the poisonous tree" (*People v. Nichols*, 117 AD3d 881, 985 N.Y.S.2d 676 [2d Dept. 2014]).

CONCLUSION

Based upon the foregoing, defendant's motion to suppress is granted.

This constitutes the Decision and Order of the court.

Dated: Brooklyn, New York

Ruth Shillingford

A.J.S.C.

End of Document